Nos. 76-1675, 76-1676, 76-1677 and 76-1814

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In the Supreme Court of the United States

OCTOBER TERM, 1977

NORTH CAROLINA UTILITIES COMMISSION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

UNITED SYSTEM SERVICE, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a)[1] is reported at 552 F.2d 1036. The opinions of the Federal Communications Commission are reported as follows: the First Report and Order (Pet. App. 1b-58b) is reported at 56 FCC 2d 593; the Second Report and Order (Pet. App. 1c-26c) is reported at 58 FCC 2d 736; the Memorandum Opinion and Order released February 13, 1976 (Pet. App. 1d-26d) is reported at 57 FCC 2d 1216; the Memorandum Opinion and Order released March 15, 1976 (Pet. App. 1e-34e) is reported at 58 FCC 2d 716; and the Memorandum Opinion and Order released April 28, 1976 (Pet. App. 1f-13f) is reported at 59 FCC 2d 83.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1g) was entered on March 22, 1977. The petitions in Nos. 76-1675, 76-1676 and 76-1677 were filed on May 27, 1977. The petition in No. 76-1814 was filed on June 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission acted properly when it established a nationwide registration program for the attachment of both carrier-provided and customer-provided terminal equipment to the interstate telecommunications network.

[1] "Pet. App." refers to the separate appendix filed in No. 76-1677.

STATEMENT

A. The Statutory Scheme

The Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, gave the Federal Communications Commission authority to regulate "interstate and foreign commerce in communication by wire and radio," and Congress directed the agency to make available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (Section 1, 47 U.S.C. 151). The grant of jurisdiction covers not only the transmission of interstate and foreign communications but also "all instrumentalities, facilities, apparatus, and services * * * incidental to such transmission" (Section 3(a), (b), (e) and (f), 47 U.S.C. 153(a), (b), (e) and (f)).

The Act contemplates dual regulation of wire communications. Although it preserves exclusive state jurisdiction over exclusively intrastate matters (Section 2(b), 47 U.S.C. 152(b)), it gives the FCC authority for certain purposes over all carriers that engage in interstate communications, including carriers that do so only through interconnection with other carriers (*ibid.*). Such "connecting carriers" thus are subject to state regulation in their roles as intrastate companies and are subject also to the major substantive provisions of the federal Act. Almost all

carriers are subject to federal regulation as "connecting carriers."

B. FCC Regulation Of Equipment Interconnection

The FCC has consistently exercised its jurisdiction over facilities used for interstate communications, recognizing that the States have concurrent jurisdiction to regulate the use of the same facilities for intrastate communications when the state regulations do not conflict with federal ones. The FCC from its inception has regulated terminal equipment used in connection with the interstate network. The telephone companies have recognized that authority; they typically file equipment interconnection tariff restrictions (formerly known as "foreign attachment" provisions) with the FCC and file conforming tariff provisions with the state or local agencies concerned.

The Commission's regulation of equipment interconnection is authorized by Sections 2(a) and 201 to 205 of the Communications Act, 47 U.S.C. 152(a) and 201-205. For example, Section 201(b) requires that charges, practices and regulations governing interstate communications be "just and reasonable." Section 201(b) gives each telephone subscriber a right "reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266, 269 (C.A.D.C.).

Early Commission decisions recognized this right,[2]

[2] See, *e.g.*, *Use of Recording Devices*, 11 FCC 1033, 12 FCC 1005, and *Jordaphone Corp.* v. *American Telephone & Telegraph Co.*, 18 FCC 644.

which received its most thorough treatment in 1968 in *Carterfone*, 13 FCC 2d 420, reconsideration denied, 14 FCC 2d 571. *Carterfone* established the customers' right to attach their own equipment to the interstate network, so long as the interconnection would not harm any telephone company's facilities or employees and would not interfere with the right of others to use the system.

No party sought judicial review of *Carterfone*. Petitioner American Telephone & Telegraph Co. filed tariffs allowing subscribers to attach all types of equipment and communications systems to the public network. The new tariffs, however, specified that electrical connection could be made only through a carrier-provided connecting arrangement.

The Commission was concerned that the connecting arrangement restrictions might be an undue interference with the customer's right to make beneficial use of the telephone network. Therefore, although it permitted the revisions to become effective, the Commission withheld approval of the tariffs and took steps to ascertain what further changes might be necessary, desirable, and technically feasible. *American Telephone & Telegraph Co. (Foreign Attachments)*, 15 FCC 2d 605, 610, reconsideration denied, 18 FCC 2d 871. In 1972 it opened formal proceedings (Docket No. 19528) to continue its investigation.[3]

[3] *Notice of Inquiry, Proposed Rulemaking and Creation of Federal-State Joint Board, Interstate and Foreign MTS and WATS*, 35 FCC 2d 539. Shortly after the inquiry began, petitioner North Carolina Utilities Commission gave notice

After a comprehensive examination of the massive record, the Commission reached three major conclusions (Pet. App. 11b, 5c, emphasis added):

> *First*, the present tariff provisions requiring the use of carrier-supplied connecting arrangements impose an unnecessarily restrictive limitation on the customer's right to make reasonable use of the services and facilities furnished by the carriers. *Second*, they constitute an unjust and unreasonable discrimination both among users (or classes of users) and among suppliers of terminal equipment. *Third*, the standards and procedures prescribed herein for the registration with this Commission of protective circuitry and/or terminal equipment will provide the necessary minimal protection against network harm * * * and will serve the public interest.

The Commission established a terminal equipment registration program. Under this program terminal equipment must comply with certain standards and technical requirements in order to be registered.[4] The

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of a proposed rule that would generally prohibit connection of customer-owned or customer-provided equipment to the communications system of any telephone company doing business in North Carolina. Upon complaint of several parties that this rule was inconsistent with federal policy, the Commission issued a declaratory ruling holding that its connection policy takes precedence over conflicting state policies. *Telerent Leasing Corp.*, 45 FCC 2d 204, affirmed *sub nom. North Carolina Utilities Commission* v. *Federal Communications Commission*, 537 F.2d 787 (C.A. 4), certiorari denied, December 13, 1976 (Nos. 76-331, 76-332 and 76-336).

[4] Initially the registration program was made applicable only to data, ancillary, and extension telephone equipment. After taking more comments, the Commission included in the program PBX, key telephone and main station telephone equipment (Pet. App. C).

requirements establish tolerances that ensure that complying equipment will not harm the network. Manufacturers can register either (a) the design of the terminal device itself or (b) the design of any special circuitry that would protect the network and be used in conjunction with terminal equipment.[5] Registered equipment may be connected directly to the network without the necessity of a carrier-provided connecting arrangement.[6]

Petitioners had asked the Commission to defer decision until it had analyzed all economic consequences that might occur if large numbers of subscribers elected to use their own equipment instead of leasing from the carriers. The Commission responded that subscribers had had the right to substitute their own equipment since 1969 under the post-*Carterfone* tariffs, and that any economic concerns would flow from the *Carterfone* interconnection policy rather than from the registration program. The economic consequences of customer interconnection were, moreover,

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[5] The Commission offered the option to register protective circuitry as a means of decreasing the cost of compliance (Pet. App. 12b). Many features of the Commission's registration program were patterned after existing telephone company practices (*id.* at 9b-10b).

[6] The Commission decided not to exclude carrier-supplied equipment from the program, finding that carrier-provided equipment was just as capable of causing harm to the network as was customer-provided equipment, and there was no sufficient reason to distinguish the two (Pet. App. 15b).

under study in another Commission proceeding, *Notice of Inquiry, Customer Interconnection in Docket 20003*, 46 FCC 2d 214. See Pet. App. 14b-15b; Pet. App. 6c-8c.

The Commission also concluded that the carriers' loss would be "minimal" (Pet. App. 15b n. 10) in light of the carriers' persistent contention that the purpose of connecting arrangements was to insulate the network from damage rather than to raise significant revenue or to discourage interconnection (Pet. App. 9c-10c).[7] Nevertheless, the Commission indicated that any carrier would be relieved of interconnection obligations if it could demonstrate the need to restrict specific instances or classes of interconnection on the grounds of economic injury (Pet. App. 14b). No carrier has attempted to make such a showing.[8]

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[7] Petitioner AT&T requested the Commission to stay the registration program. It asserted that it would have to expend some $350 million in order to comply. The Commission ruled that this "unsupported estimate of cost by a party which has consistently opposed any registration program" did not provide an adequate basis for delay (Pet. App. 19d). Moreover, the Commission had made and continues to make adjustments in the program to reduce its costs (AT&T has since reduced its estimate of loss to $94 million). The FCC envisions that compliance will be relatively "inexpensive," and any costs are justified by the public interest (Pet. App. 16b). The estimate of low compliance costs is shared by GTE, the nation's second largest telephone company (Pet. App. 4d). See Pet. App. 28a n. 23.

[8] One carrier, Mebane Home Telephone Co. of North Carolina, petitioned the Commission to exempt it from the new rules. The Commission reviewed Mebane's petition and found that it had failed to provide enough economic data to support its allegation of economic injury. Nonetheless, the Commission afforded Mebane the opportunity to establish in a hearing "that it has good cause for an exemption or waiver from the obligation it is now under." *AT&T (Mebane)*, 53 FCC 2d 473, 481, affirmed without opinion *sub nom. Mebane Home Telephone Co.* v. *Federal Communications Commission*, 535 F.2d 1324 (C.A.D.C.). The hearing was terminated at Mebane's request prior to the introduction of evidence. Mebane has not sought further relief from the Commission.

C. The Ruling Below

A divided court of appeals affirmed (Pet. App. A).[9] The court recognized that it had already rejected petitioners' argument that the FCC lacks the authority to regulate the connection of terminal equipment. *North Carolina Utilities Commission* v. *Federal Communications Commission*, 537 F.2d 787 (C.A. 4), certiorari denied, December 13, 1976 (Nos. 76-331, 76-332 and 76-336) ("*NCUC I*"). Nevertheless, the court again addressed the question. For a second time it concluded that "the Communications Act grants the FCC, rather than the states, primary authority over terminal equipment used for both interstate and local communications" (Pet. App. 26a-27a).

The court held that the statutory prohibition against federal regulation of intrastate facilities does not

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[9] Judge Widener initially stayed implementation of the Commission's orders (Pet. App. 1j). The stay was modified by the full panel to permit the Commission to implement its program as applied to customer-provided data and ancillary equipment (*e.g.*, answering devices) other than extension telephones (Pet. App. 9j). This partial stay continues in effect pending this Court's decision (Pet. App. 13j).

prevent the FCC from regulating facilities used, in part, for interstate communications; it simply prohibits the FCC from regulating "facilities 'separable from and * * * not substantially affect[ing] the conduct or development of *interstate* communications'" Pet. App. 14a). The court observed that to construe the statute to deny the FCC authority over jointly used facilities would sap it of power not only to improve the national network but even to protect the network's integrity against actions by States or others that might interfere with interstate transmissions (*id.* at 15a-16a).[10]

The court held that the Commission had ample authority to require the registration of both customer-supplied and carrier-supplied terminal equipment. The court rejected petitioners' argument that the Commission could not act without explicit statutory authorization, relying on the strong precedent establishing that Congress gave the Commission broad authority to fashion policies and programs to

[10] The court recognized that the FCC could not control the rates for exclusively local service just because those rates may be related to interstate rates (Pet. App. 16a-17a). It did not, however, accept petitioners' contention that federal control of the attachment of customer equipment would deprive the States of "meaningful" ratemaking power by hindering their ability to arrange to subsidize favored types of service. The court found that the States remained "free to approve the pricing of carrier-supplied terminal equipment above or below unit cost" and could still cross-subsidize services by establishing "differential charges for services where there is no competition" (Pet. App. 19a).

achieve its general statutory goals (Pet. App. 25a-26a).

Finally, the court rejected the claim that the FCC erred by not considering the economic consequences of the registration program. It found that petitioners were really concerned only about the consequences of the *Carterfone* interconnection policy, which has been in effect since 1969, and not the economic consequences of the registration program itself (Pet. App. 29a).

The court held that the Commission had fulfilled its responsibility to consider the economic effects of the registration program.[11] Moreover, it held the Commission's decision to implement the registration program before completing its investigation (in Docket 20003) of the long-term economic impact of the interconnection policy was a reasonable one in light of the undisputed illegality of the present tariffs, the lack of evidence of economic effects from interconnection during the last eight years, and the Commission's willingness to grant appropriate relief to carriers that demonstrate actual harm (Pet. App. 33a-35a).

ARGUMENT

Petitioners repeat in substantial measure the arguments they made in *North Carolina Utilities Commis-*

[11] The Commission had already taken steps to reduce substantially the costs of complying with the registration program, and the court saw no reason why continued cooperation between the FCC and the carriers would not keep such expenses to a minimum. See note 7, *supra*. The court found no warrant for disturbing the Commission's judgments that the compliance costs would be minimal and justifiable in light of the public benefits anticipated (Pet. App. 27a-29a).

sion v. *Federal Communications Commission*, 537 F.2d 787 (C.A. 4) ("*NCUC I*"). The Court denied certiorari in that case on December 13, 1976 (Nos. 76-331, 76-332 and 76-336), and there is no greater reason to grant review now. Indeed, there is less, for two other courts of appeals now have endorsed the holding of *NCUC I* that the FCC has the authority to regulate the connection of terminal equipment to the telephone network. See *Puerto Rico Telephone Co.* v. *Federal Communications Commission*, 553 F.2d 694 (C.A. 1); *California* v. *Federal Communications Commission*, C.A.D.C., No. 75-2060, decided June 20, 1977. There is no conflict among the circuits.[12]

[12] *Puerto Rico* affirmed a FCC order prohibiting the Commonwealth of Puerto Rico from barring attachment of customer-owned equipment to the system. *California* concluded that the FCC has authority over foreign exchange and common control switching arrangement facilities that are used for both interstate and intrastate communications.

California demonstrates that petitioners' reliance on two earlier decisions of the District of Columbia Circuit was unwarranted. That court had not thoroughly considered the matter until *California*, and there it endorsed the FCC's position. The earlier cases, in any event, offered little support to petitioners. In *National Association of Regulatory Utility Commissions* v. *Federal Communications Commission*, 533 F.2d 601 (C.A.D.C.), Judge Wilkey, speaking only for himself, concluded that Section 2(b) precluded FCC jurisdiction over intrastate point-to-point cable communications. But in that case, unlike the present one, there was no apparent interstate nexus to support federal jurisdiction. The point-to-point communications began and ended within the same state; terminal equipment, by contrast, may promptly be connected by the network to other terminals anywhere in the world. *Kitchen* v. *Federal Communications Commission*, 464 F.2d 801 (C.A.D.C.), affirmed the Commission's ruling that it lacked jurisdiction to halt construction of a building designed to hold a telephone exchange facility, because a building is not a "line" within the meaning of Section 214, 47 U.S.C. 214. The court's statement in that opinion that Section 221(b) also would bar FCC jurisdiction is *dictum*. It was the Commission's position in *Kitchen* that the construction of an exchange building in a residential area, having no effect on interstate communications, was a question for a local zoning board rather than a federal regulatory agency. In contrast, the issues involved here relate directly to the Commission's responsibility for the effectiveness of the national telephone system, and thus are entirely appropriate for its consideration.

The Commission's policy is long standing. Any change in this policy should be made by Congress rather than the courts. Petitioners support a bill that would alter the FCC's policy, and this Court should leave petitioners to the pursuit of that legislative remedy.[13]

1. *a.* Congress established the Federal Communications Commission in 1934 and gave it a mandate "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *." 47 U.S.C. 151. It authorized the Commission to regulate not only interstate services but also the facilities used to provide such services. 47 U.S.C. 152(a), 153(a), (b), (e), (f). To ensure that its regulation was effec-

[13] *See, e.g.*, S. 530, 95th Cong., 1st Sess. (1977); H.R. 8, 95th Cong., 1st Sess. (1977). These and other bills would end the Commission's authority to regulate the attachment of terminal equipment. Similar bills were introduced in the last session of Congress. Although hearings were held on them, they were not reported out by committee.

tive, Congress expressly made Sections 201 through 205 of the Act applicable to local telephone companies providing interstate service only through connection to other telephone companies. 47 U.S.C. 152(b).

All the telephone companies that are parties to this case are "integrated into the national network and subject to the provisions of section 201 through 205." *NCUC I*, *supra*, 537 F.2d at 792. The Commission's equipment interconnection policy and rulings apply to these companies because Section 201 of the Act requires that their charges and practices (including restrictions on interconnection) be "just and reasonable." See *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266, 268 (C.A.D.C.)."

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[14] The court below correctly disposed (Pet. App. 25a-26a) of petitioners' contention, briefly renewed here (Pet. No. 76-1677, pp. 25-27; Pet. No. 76-1814, pp. 26-29), that the FCC lacks authority to require the registration of carrier-provided equipment because the power is not specifically mentioned in the Act. Congress gave the FCC "expansive powers." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219. Congress did not attempt to catalogue all practices subject to FCC regulation, and the omission of an explicit grant of power does not give rise to an inference that the Commission's general grant of power does not reach carrier-provided equipment. Petitioners' alternative argument (Pet. No. 76-1677, pp. 28-30; Pet. No. 76-1814, pp. 30-32) that the registration of carrier-provided equipment violates the prohibition against acting solely for the purpose of increasing competition (*Federal Communications Commission* v. *RCA Communication, Inc.*, 346 U.S. 86) founders on the fact that the Commission's primary reason for including carrier-provided equipment in the program was the fact that such equipment has "the same *potential* for harm to the network as does customer-supplied equipment" (Pet. App. 15b, emphasis in original). This, coupled with the other benefits of having a uniform national program, is a proper justification for this aspect of the program.

Nonetheless, petitioners assert that Sections 2(b) and 221(b) of the Act, 47 U.S.C. 152(b) and 221(b), immunize telephone companies from federal regulation of facilities used for *both* interstate and intrastate communication. This interpretation is unsound. Reading Section 2(b) to deprive the Commission of the authority to regulate such joint facilities would frustrate the Act's overall aim, "to make available, * * * to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Congress intended that the interstate and international communications network be subject to national control, and it gave the Commission the power to assert that control. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157.

Petitioners' argument, if accepted, would mean that the terms of connection to the national and international telephone network would be controlled, not by the FCC, but by the 50 States. But "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication." *General Telephone Co. of California* v. *Federal Communications Commission*, 413 F.2d 390, 401 (C.A.D.C.), certiorari denied, 396 U.S. 888. If the petitioners were correct, the national telephone network would be unprotected from incapacitation by States and localities exercising economic or

technical regulation of facilities that are used for intrastate as well as interstate communication.[15] As the Supreme Court of Nebraska stated recently in describing the consequences of petitioners' position: "[S]uch a result is, we believe, legally, logically, and practically unsupportable." *Sherdon* v. *Dann*, 193 Neb. 768, 774, 229 N.W. 2d 531, 535.[16]

Petitioners also dispute the court of appeals' interpretation of Section 221(b) of the Act. That court reaffirmed the holding of *NCUC I*, stating that "the legislative history of section 221(b) leaves no doubt

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[15] For example, the Commission would be powerless to protect the network if a state regulatory commission purporting to improve local service should decide to require or allow the interconnection of equipment that in fact could damage the national network (see Pet. App. 15a-16a).

[16] Congress is aware that the 50 States combined regulate about 70 percent of the telephone system's plant investment, but that no one State has authority over as much as the approximately 30 percent regulated by the FCC. S. Rep. No. 92-362, 92d Cong., 1st Sess. 3 (1971). Moreover, although the total number of interstate calls made is decidedly smaller than the number of intrastate calls, their importance to the industry and the national communications system is more accurately reflected by the fact that almost $9.5 billion, or 30 percent of total telephone industry revenues, came from interstate or foreign calls in 1975. *Federal Communications Commission, Statistics of Communications Common Carriers*, year ended December 31, 1975, p. 30. In any event, such considerations do not determine the primacy of federal legislative authority under the Supremacy Clause of the Constitution, since it is unlikely that Congress intended to create "a regulatory scheme that depends on the calling habits of telephone subscribers to determine the jurisdictional competence of the FCC versus state utility commissions" (Pet. App. 15a).

that the purpose of section 221(b) is to enable state commissions to regulate local exchange service in metropolitan areas, such as New York, Washington or Kansas City, which extend across state boundaries" (Pet. App. 13a). Section 221(b) provides that a local carrier serving a single multi-state exchange area has "whatever degree of freedom from federal regulation section 2(b) provides for uni-state carriers and intrastate telephone business generally."[17]

Although Section 221(b) does not bar Commission action in this area, it undermines petitioners' interpretation of Section 2(b). If their reading of 2(b) were correct, the "facilities" exemption in 221(b) would be surplusage, because the telephones within a multi-state exchange are also facilities used for intrastate communication and thus would be immune from Commission regulation under Section 2(b) alone.[18]

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[17] Pet. App. 13a, quoting from *NCUC I*, *supra*, 537 F.2d at 795. Congressman Rayburn, floor manager of the 1934 bill in the House, explained that Section 221(b) is "designed to cover cases of cities located within two States, as Texarkana." 78 Cong. Rec. 10314 (1934). The rest of the legislative history confirms this intent. See S. Rep. No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934). As the court below correctly noted, Section 221(b) is not applicable to terminal devices used for interstate comunication, because they are not solely local exchange facilities.

[18] There is no merit in the similar argument (Pet. No. 76-1677, p. 19 n. 27) that petitioners' construction of Section 2(b) is necessary to give meaning to the exclusion of Section 301, 47 U.S.C. 301, from the reservation of state authority over purely intrastate operations. Section 301 requires a Commission license to engage in radio transmission, an activity that Congress meant the Commission to regulate even

b. Petitioners incorrectly suggest that the Commission has reversed itself in asserting jurisdiction over terminal equipment and has displaced long-standing state regulation. See, *e.g.*, Pet. No. 76-1677, pp. 5-7, 15. On the contrary, as the court of appeals found, cases spanning the past 30 years "firmly establish the Commission's view that when facilities are used for both interstate and local communication, state regulations must give way to federal regulations even though the latter unavoidably affect local communication in the process of regulating interstate communication" (Pet. App. 21a).

The cases in which the Commission has exercised its jurisdiction in this area are numerous. See *Southwestern Bell Telephone Co.*, 6 FCC 529, and cases at Pet. App. 21a-23a.[19] AT&T in particular has included

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when that transmission was wholly intrastate. Thus Section 2(b) refers to Section 301 to make clear that all radio operation, even that used exclusively intrastate, is within the Commission's regulatory power. There is no similar reference to the other grants of Commission jurisdiction, since wire communication and equipment used exclusively intrastate are not within the Commission's regulatory authority.

[19] See also, *e.g.*, *AT&T (Mebane)*, 53 FCC 2d 473, affirmed *sub nom. Mebane Home Tel. Co.* v. *Federal Communicatinos Commission*, 535 F.2d 1324 (C.A.D.C.); *Department of Defense* v. *General Tel. Co.*, 38 FCC 2d 803, affirmed *sub nom. St. Joseph Telephone & Telegraph Co.* v. *Federal Communications Commission*, 505 F.2d 476 (C.A.D.C.); *Hush-A-Phone Corp.* v. *AT&T*, 22 FCC 112, on remand from *Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (C.A.D.C.); *Jordaphone Corp. of America* v. *AT&T*, 18 FCC 644; *Katz* v. *AT&T*, 43 FCC 1328; *AT&T (TWX)*, 38 FCC 1127; *AT&T (Railroad*

restrictions on the use of terminal equipment in its interstate tariffs since before the FCC was created in 1934; those provisions have been the subject of Commission scrutiny a number of times. *E.g.*, *Hush-A-Phone Corp.* v. *United States*, *supra*. The Commission nearly 30 years ago made plain its judgment that it has authority over equipment used in connection with both interstate and intrastate calls when in 1947 it rejected an AT&T argument similar to that now advanced. *Use of Recording Devices*, 11 FCC 1033, 1047.[20]

What is more, AT&T itself once successfully asserted that the FCC had primary jurisdiction over a dispute involving the use of attachments to terminal equipment. The *Carterfone* case began as an antitrust suit by the makers of a device to be attached to a telephone to increase its usefulness. The case was referred by the district court to the Commission on AT&T's motion (*Carter* v. *AT&T*, 250 F. Supp. 188

Interconnection), 32 FCC 337; *Fallon Travelodge* v. *Churchill County Tel. & Tel. System*, 14 FCC 2d 972; *Department of Defense* v. *AT&T (COPAN)*, 38 FCC 2d 819.

[20] The Commission stated:

> [T]he Bell System argument ignores the real consideration that interstate and foreign message toll telephone service requires the use of facilities that are not 'exclusively interstate.' This service necessarily involves all the facilities, charges, classifications, practices, services, and regulations used in the rendition of the service, and regulation of such service must be able to deal with all or any of the matters so involved if it is to be effective. This is clearly the purport of the comprehensive common carrier provisions of the Communications Act.

(N.D. Tex.), affirmed, 365 F.2d 486 (C.A. 5), certiorari denied, 385 U.S. 1008). AT&T, not the Commission, has thus reversed itself in now asserting that the Commission has no jurisdiction over matters relating to terminal equipment used for both interstate and intrastate calls.[21]

Nor does the instant decision represent a novel attempt by the FCC to displace state regulation. It is true that federal and state regulation of equipment that is used for both interstate and intrastate calls has coexisted for many years. Because the state agencies and the telephone companies have until now acquiesced in federal regulation of terminal equipment connection by conforming the state policies with the federal policies, there has been no conflict necessitating a declaration of federal primacy. The assertion of federal authority is not new; only the conflict is new. For example, when the Commission in *Carterfone* directed AT&T to file new tariffs modifying earlier restrictions on the use of attachments to terminal facilities for interstate calls, AT&T recognized that uniform practices were required and filed conforming tariffs with the state commissions covering intrastate calls.

c. Contrary to petitioners' contentions that the decisions below are at odds with the Act's legislative

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[21] See also *Phonetele, Inc.* v. *Public Utilities Commission*, 113 Cal. Rptr. 16, 520 P.2d 400, where Pacific Telephone & Telegraph Company (an AT&T operating company) argued before the Supreme Court of California that the State should postpone adoption of a certification program pending adoption of national certification standards.

history (Pet. No. 76-1675, pp. 29-32; Pet. No. 76-1676, pp. 16-17), that history does not indicate a congressional intention to deprive the FCC of authority over terminal equipment used in interstate communications. The discussion in the legislative history of *Houston, E&W Texas Ry.* v. *United States*, 234 U.S. 342 ("the *Shreveport* case"), on which petitioners rely, reflects concern on the part of some legislators and some witnesses at the hearings about federal intrusion into *purely* intrastate matters. They read the *Shreveport* case as authorizing the Interstate Commerce Commission to regulate purely intrastate rates, and Congress sought to avoid giving similar power over purely intrastate matters to the FCC. The means they chose to avoid the *Shreveport* result was the explicit reservation in Section 2(b)(1) of purely intrastate matters to local regulatory bodies. But neither that rationale for Section 2(b)(1) nor anything else in the legislative history justifies giving the Act the cramped reading that petitioners urge.[22]

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[22] In the present case the Commission has not sought to regulate the rates charged for intrastate service. Petitioners' contention that the Commission lacks jurisdiction because the right to regulate interconnection will affect cross-subsidies in intrastate rates (Pet. No. 76-1675, pp. 33-41) is groundless. All kinds of Commission regulation of interstate telecommunications may affect rate policies that individual States consider desirable. As the court of appeals properly held, the registration program "no more curtails state ratemaking power *as a matter of statutory jurisdiction* than would the denial of state statutory authority to set rates for interstate calls in order to subsidize local exchange and intrastate services" (Pet. App. 19a, emphasis in original). Moreover, the court of appeals

2. Petitioners' contention that the Commission failed to examine the economic results of the registration program (Pet. No. 76-1677, pp. 30-33; Pet. No. 76-1676, pp. 24-25) is unsound. The court of appeals concluded that "[a] fundamental error infects petitioners' analysis of economic impact: they confuse the economic impact of the *interconnection policy*, which has been in effect since 1969, with the economic impact of the *registration program*" (Pet. App. 29a-30a, emphasis in original). Although AT&T contends that "the registration program creates an 'open door' to customer substitution of terminal equipment" (Pet. No. 76-1677, p. 31), the door had been open under the post-*Carterfone* tariffs for eight years before the Commission adopted the registration program. The FCC therefore was not bound to examine the economic consequences of the use of customer-supplied equipment as if this were a new development. Customer interconnection is a tried and proven fact of life.[23] It thus was proper for the Commission

correctly observed that if States wish to cross-subsidize certain kinds of service, they retain appreciable latitude to do so (*ibid.*).

[23] The Commission found, on opening the present inquiry, that the *Carterfone* policy had been beneficial (see 35 FCC 2d at 542):

> New markets have been opened to the innovative enterprise of many companies; the public has benefitted from having a range of choices available when the individual user selects the terminal device or private system which will best serve his particular communications need; and there has been no actual demonstrable harm to the telephone system or its users.

Notice of Inquiry, supra, 35 FCC 2d at 542.

to focus in these proceedings solely on the economic implications of the action contemplated, *i.e.*, implementation of a registration program. Cf. *Aberdeen & Rockfish R.R. Co.* v. *SCRAP*, 422 U.S. 289, 324-325 (Interstate Commerce Commission need not analyze environmental effects of entire railroad rate structure in order to approve an increase; it is enough to analyze the effects of the change).

The Commission designed the registration program so that compliance would impose "minimal" expense or inconvenience upon individual telephone companies (Pet. App. 16b; *id.* at 4d). The Commission further found that its decision would not cause a significant revenue loss for carriers, because it would "affect only the differential costs and revenues associated with customer-provided vis-a-vis carrier-provided protective circuitry and procedures—not with the terminal device *per se*" (Pet. App. 15b n.10). This finding is clearly proper, since the carriers had never contended that the charge for connecting arrangements raised significant revenues or was intended to discourage interconnection; the companies maintained that they used connecting arrangements only as a means to protect the network from harm (Pet. App. 9c-10c). That being so, the FCC was entitled to assume that a shift to a registration policy would not deprive telephone companies of profits from leasing connecting arrangements.[24] Moreover, the Commission provided a safety

[24] This is not a case like *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80. The Commission found, and the court agreed, that the only economic effect attribut-

valve to allow any carrier to seek relief from any substantial hardship it might suffer as a result of its interconnection obligations. The carrier need only file a petition and demonstrate that "compliance with the obligation * * * has already resulted in or will result in direct, substantial and immediate economic injury to [the] telephone system and detriment to the public interest." *AT&T (Mebane)*, 53 FCC 2d 473, 480.

Petitioners' real claim thus must be that *Carterfone* should be overruled and customer interconnection barred or sharply restricted. The Commission has provided petitioners a forum in which to make these contentions in Docket 20003. This Docket, established in 1974, has already produced a *First Report and Order*, 61 FCC 2d 766. The inquiry continues, but the Commission very properly ruled that the pendency of this inquiry was no reason to defer action on the registration program, which is reasonably designed to remedy the carriers' practices of discrimination against, and unreasonable interference with, rights already established in *Carterfone*.

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able to the registration program would be the loss of the insignificant connecting arrangement business; any loss of terminal equipment business "would properly be attribut[able] to the *interconnection policy* which ended the carriers' monopoly over terminal equipment, and not to the *registration program*" (Pet. App. 32a, emphasis in original). The court's brief common-sense observations recognizing the significance of the lack of any evidence of "diminished sales of [carrier-provided] terminal equipment" under the interconnection policy in effect since 1969 (Pet. App. 31a-32a) can hardly be characterized as a post-hoc rationalization.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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